



## POLICE DEPARTMENT

December 27, 2011

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Selina Rentas  
Tax Registry No. 909868  
28 Precinct  
Disciplinary Case No. 85956/09 (2009-2465)

The above-named member of the Department appeared before the Court on July 29, 2011, August 1, 2011, and August 15, 2011, charged with the following:

1. Said Lieutenant Selina Rentas, while assigned to the Detective Bureau, Fugitive Enforcement Division, on or about October 31, 2008, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Lieutenant after discovering that Sergeant Donna Samuels, tax # 898466, filed a complaint of employment discrimination against her, requested that the Medical Division perform a psychological evaluation of Sergeant Donna Samuels, without a legitimate basis to do so.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT  
GENERAL REGULATIONS

2. Said Lieutenant Selina Rentas, while assigned as indicated in Specification #1, on or about February 4, 2009, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Lieutenant after discovering that Detective Lina Santamaria, tax # 907260, filed a complaint of employment discrimination against her, improperly issued a Command Discipline to Detective Lina Santamaria for allegedly not conducting an assignment properly.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT  
GENERAL REGULATIONS

The Department was represented by Vivian Joo, Esq., Department Advocate's Office. Respondent was represented by Bruce Wenger, Esq., Wenger & Arlia LLP.

Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

Respondent is found Not Guilty.

### SUMMARY OF EVIDENCE PRESENTED

#### The Department's Case

The Department called Lieutenant Donna Samuels, Deputy Chief James O'Neill, Lieutenant Victor Swinton, Detective Lina Santamaria, Sergeant Steven Bozeman, Inspector Michael Cassidy, and Sergeant Dorothy Aiello as witnesses.

#### Lieutenant Donna Samuels

Samuels, a 21-year member of the Department, was currently assigned to the Fleet Services Division. In 2007, Samuels was a sergeant in the Juvenile Crime Squad (JCS), a sub-unit of Respondent's command, the Fugitive Enforcement Division (FED). That April, while Samuels and Respondent attended Dignitary Protection Training together, Samuels informed Respondent that she was interested in attending a teaching course called Methods of Instruction (MOI) at the Police Academy. Respondent replied that she would be able to get Samuels into that class.

During a subsequent telephone call, Samuels asked Respondent about the MOI class. Respondent again replied that she would be able to get Samuels into the class, but she then asked, "What are you going to do for me?" Samuels found this question to be inappropriate and offensive. She handled the situation by laughing it off. Respondent later told Samuels that she should write a '49' requesting the class, but Samuels opted not to pursue it because she "didn't like the way things had gone since [she] asked her, and [she] didn't like the way it continued the conversation." Samuels was no longer friendly with Respondent and tried to avoid her.

At first, Samuels did not need to have much interaction with Respondent, but contact became more frequent after the implementation of a new statistical form that had to be sent to Respondent on a weekly basis. When they interacted, Samuels found Respondent to be aggressive, condescending and rude. Samuels reported the situation to Lieutenant Victor Swinton, her integrity control officer (ICO). She met with Swinton several times in his office between April and October 2008. Respondent's desk was situated directly in front of Swinton's door, and the door was always open.

In September 2008, a sergeant in the Office of Equal Employment Opportunity (OEEO) contacted Samuels to inform her that Swinton had filed a complaint on her behalf. Samuels told the OEEO sergeant that she did not wish to pursue the matter because she was waiting to be promoted and wanted to leave her assignment peacefully. In between her meetings with Swinton, Samuels told Deputy Chief James O'Neill that Respondent was creating a "hostile work environment" by speaking to her in an unprofessional, rude and aggressive manner.

In October 2008, O'Neill wrote a '49' that named Respondent as Samuels' new direct supervisor. After that, Samuels needed to have more contact with Respondent. Respondent would call Samuels to discuss day-to-day activities, and the situation between them deteriorated.

Samuels believed that Respondent was harassing her.

Samuels asserted that when she called to report sick on October 30, 2008, Respondent asked her inappropriate and intrusive questions. After Samuels told Respondent that she wanted to speak with O'Neill, the call was disconnected. When Samuels called back, Respondent told her that O'Neill was busy. Feeling that she had no other options at that point, Samuels contacted OEEO. When she told OEEO about Respondent asking her, "What are you going to do for me," she explained that she felt Respondent was coming on to her. Samuels testified that both she and Respondent dated women.

Samuels filed a written complaint with OEEO on November 3, 2008 (see Department's Exhibit [DX] 1, Samuels' OEEO complaint alleging gender and sexual harassment occurring on Oct. 30, 2008, Samuels' complaint of retaliation dated Nov. 17, 2008, & notice of complaint to Resp't dated Nov. 26, 2008).

On November 14, 2008, Samuels received a notification to report to the Psychological Services Section (PSS). When she reported there three days later, she underwent an evaluation for fitness for duty, and she was shown a memorandum indicating that it was Respondent who had referred her for psychological review. The memorandum was dated October 31, 2008, which was the date that Samuels was promoted to sergeant supervisor detective squad (SSDS). The evaluation resulted in Samuels being deemed fit for duty.

DX 2 was a copy of Respondent's memorandum to the director of the Psychological Evaluation Section (PES), requesting Samuels' review. In the memorandum, Respondent described Samuels' behavior as "unstable," "anti-social" and "aggressive," "to the point of insubordination, particularly when she is questioned about her supervisory duties." Respondent wrote about a time that Samuels asked for time off because her grandfather had died. When

Respondent questioned Samuels about the death, Samuels responded, "That's besides the point, I want to know if I can take off on Friday." Respondent also wrote that "[w]ithout exception," Samuels changed her tour or took an excusal whenever she was scheduled to work a 1400x2200 tour on a Thursday or Friday. In addition, Respondent noted that Samuels performed the minimum of her duties and responsibilities, and that Respondent overheard a year earlier that Samuels had a gambling problem while she was assigned to her previous command. DX 3 was the FED Communications Log, indicating that Respondent sent a communication to PES on October 31, 2008.

Samuels denied that she had a pattern of changing her tours on Thursdays and Fridays when she was assigned to work a 1400x2200 tour. She further denied that she had a gambling problem. She requested chart days for October 16 and 17, 2008, because her grandfather had died. Respondent denied the request for the days off. In her conversation with Respondent about her grandfather's death, Samuels did not recall stating, "That's besides the point."

When asked about her relationship with Sergeant Susan McConnell, Samuels explained that they worked together in two different commands. Their relationship was "professional" but they did not care for each other.

On cross-examination, Samuels confirmed that she did not personally file an OEEO complaint in September 2008, nor did she ask Swinton to file a complaint on her behalf.

Although Respondent did not ask Samuels out on a date, Samuels "assum[ed]" that Respondent's comment was sexual. The comment made Samuels mad, and she immediately talked about it with another detective. She did not notify Swinton until several months later. She did not recall if she ever told Respondent or anyone else about the OEEO complaint that Swinton initiated.

Samuels denied that she did not like working the night tour on Thursdays and Fridays. She was not happy, however, that after October 1, 2008, she needed to report directly to Respondent. On Thursday, October 2, and Friday, October 3, 2008, she was scheduled to work a 1330x2200 tour. While she worked her regularly scheduled tour on Friday, on Thursday she changed her tour to 1130x2000 (see Respondent's Exhibit [RX] A, roll call from Samuels' command for week beginning Sept. 28, 2008). The next time that she was scheduled to work a late tour on a Thursday or Friday was two weeks later (October 16 and 17, 2008), which was when she requested chart days because her grandfather died. Samuels could not recall if she told other people in the command that somebody else had died. She explained that because the person she called her grandfather was her grandmother's husband but not her biological grandfather, she might have described him differently to different people.

Samuels went out sick two weeks after her grandfather's death, just before Halloween 2008 (October 29 and 30, 2008). Had she been assigned to work at the parade that year, the detail would have had to have been re-assigned.

Samuels testified that while she did not notify Swinton or O'Neill that she was filing an OEEO complaint against Respondent on October 30, 2008, she probably told friends who were members of the service. She stated at a November 2008 official Department interview, however, that she notified Swinton and O'Neill but did not tell anybody else. She insisted that she was not untruthful at her interview and was testifying currently based on her recollection of events.

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When Samuels did discuss Respondent with Swinton and O'Neill, she described it as a personality conflict and not a sexual issue. She admitted that this description of the matter was dishonest.

Respondent on numerous occasions called Samuels for information that was needed for

Compstat. Samuels did not always get the information to Respondent in a timely fashion. Samuels denied that she did not like Respondent because Respondent made her work harder than she was used to.

Samuels conceded that once, in 2007, she lied when she claimed that Respondent authorized her to go out on sick leave. There was also an incident when she received notification to work the ticker tape parade for the Giants winning the Super Bowl, but she did not report to the detail. She confirmed that prior to October 1, 2008, she could change her tour without checking with anybody.

Samuels explained that Compstat was usually on Thursdays and sometimes on Fridays. She occasionally needed to change her tour to an earlier start time on Compstat days because the meetings started at 0800 hours.

Samuels denied that she had an issue taking orders from Respondent. While she admitted being antisocial toward Respondent, she did not argue with her about decisions that she made. Samuels did not know of anybody telling Respondent about the OEEO complaint that Swinton initiated in September 2008, or about the OEEO complaint that she initiated herself in October 2008.

On re-direct examination, Samuels testified that she did not tell Swinton and O'Neill right away about Respondent's "What are you going to do for me?" comment because she did not want to disclose her sexual orientation to them. She gave the same reason for describing the situation with Respondent to them as a personality conflict instead of a sexual issue.

Although Samuels requested to take chart days on October 16 and 17, 2008, she worked night tours those days because Respondent ordered her to work. She submitted her request in a timely manner. She then testified that she did not know if the request was approved by a

supervisor. Samuels was never notified about working the Halloween Parade detail.

Concerning the incident in 2007 when she falsely claimed that Respondent gave her authorization to report sick, Samuels explained that she needed to give the sick desk the name of an approving supervisor and because her command was closed at the time, she gave the sick desk Respondent's name without Respondent's knowledge. She also explained that she was antisocial with Respondent because she was offended by Respondent's comment and wanted to limit any social contact with her. She wanted to keep their relationship "totally professional."

On re-cross-examination, Samuels first denied that she had Respondent's cell phone number but later stated that she did not recall if she had the number.

Deputy Chief James O'Neill

O'Neill, a 28-and-a-half-year member of the Department, had been assigned to FED since January 2008. On November 17, 2008, Samuels called O'Neill as she was returning to the command from PSS. This was the first time that O'Neill heard of Samuels going for such a review, as Respondent never mentioned to him that she thought Samuels needed psychological evaluation. O'Neill did not believe that Samuels was in need of psychological evaluation, nor did he believe that the reasons given by Respondent in her memorandum justified the evaluation. O'Neill did not have problems with Samuels' work performance, nor did he find her to be antisocial. While Respondent had brought personality conflicts with Samuels to O'Neill's attention, he did not receive any complaints about Samuels' job performance.

On cross-examination, O'Neill testified that Respondent prepared, and he signed, the October 1, 2008, '49' that made it necessary for Samuels to report directly to Respondent. He denied that the memorandum was prepared specifically because of Samuels' tour changes.

While he did not recall Respondent ever specifically telling him that Samuels changed her tour on a regular basis, he did recall Respondent discussing with him “a couple of issues” and personality conflicts with Samuels.

While O’Neill recalled Respondent telling him about Samuels asking for time off when her grandfather died, he did not recall Respondent telling him that Samuels stated “that’s besides the point.” Samuels never told O’Neill about Respondent making a sexual comment to her, and Respondent never told him that Samuels’ work performance declined in October or November 2008. He did not document any of the conversations that he had with Respondent or Samuels because he did not “feel it rose to that level.” He did, however, tell Swinton to “call in logs on a few different occasions.”

Respondent worked directly under O’Neill, and O’Neill described her as a hard worker who did excellent work. He confirmed that she was the type of person who liked to get things done right away.

Lieutenant Victor Swinton

Swinton, a 28-year member of the Department, had been assigned to FED since October 2002 and was its ICO. In 2008, he and Respondent worked in the same office in Brooklyn while Samuels worked in a different location. Samuels complained to Swinton once a week, either by telephone or in person at his office, that Respondent “was riding her a little hard.” When they spoke in his office, his door was probably open, as he rarely closed his door. Respondent sat at a desk a few feet from Swinton’s office door.

On September 11, 2008, Swinton contacted OEEO on behalf of Samuels. He explained that he did this after Samuels complained that her work environment was becoming “a little

hostile." He lodged the complaint at O'Neill's direction.

Respondent never mentioned to Swinton that she thought Samuels needed to go to PSS for an evaluation. He did not know that Respondent sent Samuels for psychological review until after the fact. Based on his observations of Samuels, Swinton did not believe she needed psychological evaluation.

Upon review of roll calls for the period between July 27 through November 1, 2008, Swinton testified that he did not notice any patterns regarding Samuels' tour changes. He did not believe Samuels to have a negative attendance record that warranted discipline. When asked what McConnell's attendance record looked like, Swinton replied that McConnell's "attendance was a little tricky . . . sometimes [he] didn't know what tour she was doing, so [he] would have to kind of straighten that out once in a while" (see DX 4, Samuels' Absence and Tardiness Record for 2008; DX 5a-n, roll calls for weeks beginning July 27 through Oct. 26, 2008).

Respondent complained to Swinton that Samuels did not say hello when she came into the office and she was not going to tolerate it any more. Swinton told her that not saying hello was not a reason for discipline. According to Swinton, Samuels was not resistant to his supervision nor was she in need of extra supervision. When he evaluated Samuels, he rated her 4.5 out of 5.0. In addition, he recommended that she be promoted to SSDS.

On cross-examination, Swinton confirmed that the purpose of the October 2008 '49' was for sergeants to notify a supervisor about tour changes.

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Swinton did not warn Respondent that he was going to file the September 2008 OEEO complaint. It was not possible that Respondent found out about the complaint directly from him. He did not know if O'Neill told Respondent about it.

Samuels did not tell Swinton on October 30, 2008, that she was filing an OEEO

complaint against Respondent. He was unaware of the complaint until Respondent mentioned it after her official interview. Swinton testified that he heard Respondent refer to the OEOO complaint filed by Samuels after that interview, saying that "she just got GO'd for Samuels." Swinton did not know the exact date of that occurrence.

Swinton never read the referral that Respondent prepared for Samuels' psychological review. He did not have any knowledge that the referral was based on retaliation.

According to Swinton, Respondent was a hard worker who got things done and demanded a lot from all of her subordinates. Samuels told Swinton that Respondent "favor[ed] one side more than the other." According to Swinton, both Samuels and McConnell "got [their] work done but needed some pushing once in a while."

Detective Lina Santamaria

Santamaria, an 18-year member of the Department, had been assigned to the Chief of Detectives Training Unit (CDTU) for approximately four years. When she started at her current command in 2007, she and Respondent began working together and also had a friendly relationship. They would exercise together during lunch. Santamaria was also good friends with Respondent's girlfriend, Lisa Scalsa, a former member of the service that helped train Santamaria.

The relationship between Santamaria and Respondent started to change in September 2008 when Santamaria was nominated president of the Policewomen's Endowment Association (PEA). Santamaria explained that the PEA had previously been geared toward gay women, and her mission as president was to broaden its appeal and ensure "that people weren't hesitant to come to a meeting or participate with us thinking that we were just all one way." Around that

time, Santamaria began to notice Respondent making remarks about her wearing pink clothing. In addition, Respondent started to communicate with her by leaving notes instead of speaking with her in person. It seemed to Santamaria like "something had broken the bond that [she] thought [they] had."

While Respondent was out to lunch on October 29, 2008, Santamaria received a call on her cell phone to report back to the command forthwith, that Respondent seemed upset and wanted to see her. Santamaria returned to work. When she saw Respondent, Respondent signaled for her to "go outside the front of that office," which was an area in public view. Respondent, who was angry, proceeded to point in Santamaria's face and asked her who gave her authorization to move her desk. Respondent berated her as people were coming in and out, leaving her feeling humiliated. Santamaria told Respondent to calm down and asked if they could speak more privately inside the office. Respondent did not want to go into the office but wanted to continue their conversation in the bathroom instead. Santamaria did not want to go into the bathroom, and Respondent would not calm down. Respondent was shaking her hands in anger as if she wanted to hit Santamaria.

Inspector Michael Cassidy intervened, bringing Respondent and Santamaria into a room to discuss what was going on. Santamaria explained to Cassidy that she moved her belongings to the desk where Detective Francis (Frank) Ortiz previously sat. Ortiz had recently been transferred to another office downstairs. Santamaria also told Cassidy that she found Respondent to be unprofessional by berating her in front of other people, and that she felt Respondent favored men and was not giving her the opportunity to work. Cassidy told Santamaria that going forward she would be supervised by Sergeant Steven Bozeman instead of Respondent.

After arriving late to work on November 6, 2008, Santamaria left a Leave of Absence

Report ('28') on the command log. She subsequently observed Respondent give the form to the custodian to make copies. Copies of the command log were also made. Santamaria informed Bozeman that Respondent was looking at the paperwork and asked him if anything was wrong. Bozeman went to speak with Respondent about the situation, but Santamaria did not know what happened after that.

Later that day, Santamaria called OEEO to report that she was working in a hostile work environment, feeling like Respondent "was out to hurt [her] in some kind of way." Santamaria also prepared a formal written OEEO complaint that day (see DX 6, Santamaria's OEEO complaint, notice of complaint to Respondent signed Nov. 26, 2008).

On February 9, 2009, Santamaria was informed by Respondent that she was being issued a command discipline (CD) for poor work that she had done on an I-Card. Santamaria asked for a copy of the I-Card at issue, but Respondent snatched it away from her before she could review it. Similarly, Respondent never gave her an opportunity to review the CD. Sergeant Kathleen Dawson, who was Santamaria's direct supervisor at the time, was also present at the meeting. The CD, which was the only one that Santamaria had ever received for poor work performance, was ultimately voided by the deputy commissioner of OEEO. As for the I-Card, Santamaria testified that she conducted her investigation as she had been taught, and that when Ortiz subsequently conducted the same investigation he came up with the same results (see DX 7, CD, alleging that Santamaria did not properly conduct investigative assignment, copy of I-Card, & summary of Ortiz's results for comparison).

Santamaria testified that she worked closely with Ortiz and became very friendly with him. While the situation with Respondent unfolded, however, Ortiz distanced himself from her. Similarly, Santamaria was friendly with Dawson until Dawson returned from maternity leave in

January 2009. At that point, Dawson “kind of pushed [her] aside” and also spoke to her for the first time about her work performance being negative.

On cross-examination, Santamaria testified that she had charges and specifications brought against her in 2010. The case was ultimately dismissed with the matter being returned to her command for the issuance of a CD with the forfeiture of ten vacation days. The case stemmed from Santamaria’s failure to notify her commanding officer of her changed social status. She had been married to a captain in the Department, then she remarried. She had a **Minor BM** with her second husband in which he stole her car within the confines of the 84 Precinct. Santamaria went to the 84 Precinct station house to report the incident and was interviewed there by a captain. At trial, she first denied, then admitted that she told the captain she was not married because she was embarrassed about divorcing a captain and remarrying “someone that wasn’t of the same stature so to speak.” She subsequently reported the truth about her marital status in an official Department interview.

Santamaria testified that there was nothing except a computer on Ortiz’s desk when she moved her belongings there. Ortiz had been gone for three weeks at that point. She never spoke with Ortiz about taking over his desk because he was no longer speaking with her.

Santamaria stated that she was never dishonest with Detective Frank Moceri about child care issues. If she ever told Moceri that she had to go home regarding her daughter while her daughter was in fact in California, it was because she needed to send money to her daughter and had to go to the bank during banking hours.

Santamaria would not be surprised if records showed that in 2008 she was late to work 16 times on Monday mornings. She had previously been told that Monday was the day that her cases had to be handed in for Squadstat (the Detective Bureau’s review system). Santamaria

always tried to ensure that her work was completed in a timely manner. At one point she was informed that the start time for her tour would be changing from 0427 to 0500 hours.

Santamaria did not recall having a conversation with Ortiz on October 27, 2008, nor did she recall telling an OEEO sergeant that she had a disagreement with Ortiz on that day. According to Santamaria, Ortiz never told her that Respondent wanted Squadstat done in a specific way. On October 28, 2008, however, there was a meeting with Respondent, Moceri and Ortiz with regard to Squadstat, and Santamaria drew up minutes. She admitted that she had never taken minutes prior to that meeting, but denied that she was doing so to get Respondent in trouble.

Before Dawson left on maternity leave in August 2008, she spoke to Santamaria one time about her work performance. That conversation, which took place around the summer of 2008, was about Santamaria using a new template on her I-Card investigations. Respondent was present at the conversation. Santamaria's work performance did not change between the time Dawson left for maternity leave and her return in January 2009. She explained that there was nothing wrong with her work performance, and she remained courteous and professional with everybody.

Santamaria recalled a time in 2008 that Respondent called and asked her to conduct a search for Deputy Chief Larry Nikunen (the Detective Bureau's executive officer at the time). While there was a document that was obtainable only by going to court, Santamaria did not go to court as part of her investigation. Instead she used Department computer applications to complete the search to the best of her ability. She had an E-Justice code and conducted her own searches, except one time when her National Crime Information Center (NCIC) certification expired and Moceri ran a search on her behalf.

At one point, Santamaria wanted to attend the funeral of a lieutenant who had committed suicide. Dawson told her that she would need to submit a '28' to go to the funeral. Santamaria subsequently spoke with Cassidy about the matter.

Santamaria denied ever leaving her command and disappearing for periods of time without telling anybody. She had not been disciplined for misuse of time.

Santamaria conceded that there were deficiencies with the I-Card that prompted the issuance of the February 2009 CD. That I-Card was never returned to her to make corrections. Respondent never told Santamaria that she had a problem with her work performance.

On re-direct examination, Santamaria explained that she had been advised that she could do overtime on Mondays if she needed extra time to get her work done. It was common for the people in her unit to use each others' codes to run computer inquiries. She was not shown the deficiencies on the I-Card until February 18 or 19, 2009, which was after the CD had been issued.

On re-cross-examination, Santamaria confirmed that she was supposed to stay late if one of her co-workers needed her help on a Monday. She was not required to stay late, however, so long as she completed her work in a timely manner.

Sergeant Steven Bozeman

Bozeman, a 20-year member of the Department, was previously assigned to CDTU. On November 6, 2008, he called OEEO because Santamaria had reported to him that she felt she was being harassed and in a hostile work environment. Before calling OEEO, he notified Cassidy of the matter.

While assigned to CDTU, Bozeman had the opportunity to observe Santamaria's

relationship with Respondent. They used to have a friendly relationship but it later became very adversarial. Cassidy attempted to diffuse the situation by having Santamaria report directly to Bozeman instead of Respondent. On the day that he called OEEO, Bozeman saw Respondent making copies of the command log that was assigned to his office. Santamaria was listed in the command log, which was located on the fifth floor of the building. Respondent worked downstairs on the building's main floor and she did not supervise the members listed in the log.

On cross-examination, Bozeman testified that Ortiz was very good at his Squadstat duties, perhaps better than was Santamaria. Bozeman could not recall if Santamaria changed her tours often. He explained that people in the office had flexible working hours, and he did not think Santamaria changed her tour any more often than anyone else. He would be shocked to know that she changed her tour 16 times on Mondays during 2008. Santamaria normally followed through on orders that Bozeman gave her, but like any other subordinate she at times needed a little extra guidance. On several occasions, Dawson complained to Bozeman about Santamaria's work.

Bozeman was unaware of Respondent ever making copies of the command log on any day other than November 6, 2008, but it was possible that she did. Although Santamaria worked under Bozeman, Respondent was Santamaria's supervisor for Squadstat. Because Respondent reported directly to a chief, she liked to make sure that Squadstat assignments were a good product. She sometimes wanted assignments done in a specific way. Bozeman had very little interaction directly with Respondent, but he stated that she seemed to be fair.

Inspector Michael Cassidy

Cassidy, a 23-year member of the Department, was currently assigned to the Detective Bureau's Central Investigation and Research Division. In October 2008, he was the

commanding officer of CDTU. CDTU was comprised of the Investigative Review Section, which prepared Squadstat, and a training section. Cassidy had also worked in OEEO as both a sergeant and a captain.

At approximately 1500 hours on October 29, 2008, Cassidy heard a loud discussion taking place between Respondent and Santamaria about Santamaria moving her belongings to Ortiz's desk. Respondent thought that Santamaria should be concerned with proper preparation of case material for Squadstat instead of moving desks. Cassidy advised Respondent that she should never express anger to a subordinate, especially in public view.

Later in the day, Santamaria came to see Cassidy in his office. She told him that Respondent seemed to favor men. This prompted Cassidy to call OEEO and inform them about the allegation made by Santamaria.

On October 30, 2008, Cassidy restructured the line of supervision between FED and CDTU. Under the new structure, Bozeman (of CDTU) was Santamaria's immediate supervisor. Cassidy explained that he restructured the supervision because he wanted to prevent any confrontations between Respondent and Santamaria, and to avoid Squadstat issues. Additionally, Cassidy said that when restructuring the supervision, he also took into account the fact that Moceri and Ortiz executed a warrant without notifying Cassidy.

On November 6, 2008, Cassidy learned that Respondent was making copies of the command log and roll calls. Cassidy reminded Respondent that she was not Santamaria's immediate supervisor, nor was Respondent assigned to an internal investigation.

On February 6, 2009, Cassidy received a completed CD in his inbox. The CD was issued on February 4, 2009, by Respondent to Santamaria, while Santamaria was out on sick leave. Further, the caption on the CD which must be completed by the executive officer or commanding

officer had been completed by Respondent. Santamaria's immediate supervisor at the time was Bozeman. Cassidy added that he did not think that the allegations necessarily warranted a CD. Before processing the CD, Cassidy consulted OEEO and was told by Deputy Commissioner Neldra Zeigler not to process it.

On February 23, 2009, Cassidy heard that Nikunen wanted Santamaria off Squadstat and moved to the training section. He asked Dawson, who said Respondent had told her the information. Respondent told Cassidy that she spoke with Nikunen and O'Neill and was instructed to move Santamaria. Cassidy told her that unless he was given a directive from "a higher authority within my chain of command," Santamaria would not be moved.

On cross-examination, Cassidy stated that issuing a CD depended on the circumstances, and that before a CD was issued, either one or several warnings may be given. Cassidy acknowledged that Respondent warned Santamaria three times before issuing her a CD. Further, in 2009, Bozeman was having timeliness issues with Santamaria.

Cassidy also acknowledged that there was mandatory overtime for the detectives on Monday mornings. Typically, detectives would begin their overtime at 0500, but Santamaria could not start at 0500 and changed her tour several times. He testified, however, that his issues with Santamaria's work product related to Squadstat, not her tours.

Cassidy only saw Santamaria's Squadstat report pertaining to the CD, but Squadstats usually were reviewed by Bozeman. Cassidy also acknowledged, however, that before a Squadstat report was released, Respondent also was permitted to review it.

Cassidy had not been aware that Santamaria was going to take Ortiz's desk prior to the incident.

Cassidy recalled the incident where Santamaria was asked to prepare a '28' to attend a

Department member's funeral. Cassidy stated that it was not a retaliatory act to demand a '28' under those circumstances, but that there were also times where a member could attend on job time and a '28' would not be required. Cassidy indicated that it was a matter of discretion, but that if attending the funeral was more of an official-capacity act than one of friendship, a '28' was less likely to be a requirement.

From October 2008 to February 2009, Squadstat material was reviewed by Bozeman and either Respondent or Dawson.

On re-direct examination, Cassidy said that if confronted with the CD situation, he would first prepare informal documentation, and if that did not work he would prepare an interim evaluation.

Sergeant Dorothy Aiello

Aiello was assigned to OEEO as an investigator. She testified that she received a complaint from Samuels in which Samuels alleged that she was being sexually harassed by Respondent. After investigating the allegation, Aiello concluded that the allegations of discrimination were unfounded. She signed off on the documents and forwarded it to her supervisor. While Respondent's case folder was in Zeigler's office awaiting final review, Aiello received another complaint about Respondent which prompted her to reopen the investigation for a retaliation allegation.

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In her investigation, Aiello interviewed Swinton, O'Neill and Samuels, and found no evidence of retaliation. She subsequently received information, however, that substantiated the allegation of retaliation.

Aiello substantiated the retaliation claim for the following reasons. First, she noted that

Respondent denied Samuels an emergency day off, or E-day. Samuels wanted to take an E-day for the death of her grandfather. Respondent said she was not satisfied with Samuels' reason. Second, Respondent denied Samuels two administrative sick days because Samuels was excessively going sick. However, during the investigation, Aiello learned that Samuels had not gone sick the entire year. Third, on the day of Samuels' promotion, Respondent sent the '49' requesting a psychological review without notifying, or requesting permission from, her commanding officer.

Aiello added that during her interview with Swinton, she learned that Respondent might have overheard Swinton's conversation with Samuels regarding the EEO complaints. Aiello also testified that Respondent told her that when Samuels said she was going to bring an EEO complaint, Respondent "ran to" O'Neill, who had Swinton make a notification. Thus, Respondent knew about the September 11, 2008, referral.

On cross-examination, Aiello stated that she received the initial complaint from Samuels on October 30, 2008, but on September 11, 2008, Swinton had called on behalf of Samuels and made a complaint. Aiello testified that she determined that neither O'Neill nor Swinton told Respondent of the allegations made against her.

Aiello reviewed Respondent's request for a psychological evaluation for Samuels. It stated that Samuels was fixated on taking Friday and Saturday off or adjusting her tours. When Aiello investigated these claims, however, she learned that Samuels had only adjusted her tours five or six times.

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Aiello stated that the Patrol Guide requires notification to the commanding officer before a uniformed member is referred for a psychological examination. Respondent said during her interview that she told O'Neill, in sum and substance, "that girl needs to be evaluated," and that

O'Neill replied, "okay," or "I can have it done." O'Neill denied this to Aiello.

Aiello testified that Samuels was extremely rude during her interview and also had a problem with authority.

#### Respondent's Case

Respondent called Detective Frank Moceri, Police Officer Irene Ott, Sergeant Kathleen Dawson and Francis Ortiz as witnesses. She also testified on her own behalf. The official Department interview of retired Sergeant Susan McConnell was also admitted into evidence.

#### Detective Frank Moceri

Moceri, an 18-year member of the Department, was currently assigned to CDTU. He started working in Squadstat under Dawson and Respondent in September 2008. He testified that Santamaria's work "would always be running late, she would never finish or do a thorough investigation." He was sometimes instructed to review her work and would find mistakes. He was normally assigned to work on two cases each week but would be responsible for additional cases when one of his co-workers went on vacation. During those weeks when he had extra cases, he would finish his work in a timely fashion. In contrast, once while he was on vacation, Santamaria was supposed to handle his cases but failed to get any of the work done.

Before coming to the unit, everybody was informed that Mondays would be a long workday, as captains came to the office that day to evaluate the cases. People started working on Mondays at 0500 and would not finish until 1800 or 1900. There were times that Santamaria left early, stating that she had child care issues, and Moceri had to finish her work.

On October 29, 2008, Santamaria moved her belongings to Ortiz's desk. Ortiz was very

upset by Santamaria's actions and asked her why she would do such a thing. Ortiz had previously told Moceri that the desk was where Moceri would eventually sit.

Moceri described Respondent as a fine and fair supervisor. If she saw something that was not done properly, she would explain numerous times the right way to do it and let the officer make corrections.

While Moceri and Ortiz had valid codes to conduct searches on the computer, Santamaria had limited access to the database because she was not authorized to perform NCIC and Triple-I (Interstate Identification Index) checks. She, therefore, had to ask them to run checks on her behalf on numerous occasions.

On cross-examination, Moceri testified that because Respondent and Santamaria worked on different floors from each other, he did not notice at first how they interacted with each other. He later saw that they argued.

Ortiz was still using the desk when Santamaria moved her belongings there. Although Ortiz was planning to move downstairs, he stayed on the fifth floor for a few months so that he could train Moceri. Moceri admitted that the Squadstat detectives had individual cases but worked as a team and it was not uncommon for them to ask one another for help.

On re-direct examination, Moceri confirmed that Santamaria was frequently late to work and was “[a]bsolutely not” a “team player.” Respondent would get upset with Santamaria when Santamaria’s cases were not done in time. The work they did was time-sensitive and needed to be ready by a specific time for evaluation.

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Police Officer Irene Ott

Ott, a 21-year member of the Department, was assigned to FED. She testified that she worked with Samuels in 2008. According to Ott, Samuels was a very rude and unpleasant person to work with.

Ott said that Respondent was her direct supervisor and as a supervisor, Respondent was very professional and fair.

Sergeant Kathleen Dawson

Dawson, a 13-year member of the Department, had been assigned to CDTU. She assisted Respondent with Squadstat. She testified that Respondent treated people fairly and worked very hard. Dawson was assigned to CDTU in November 2007.

Dawson regularly dealt with Santamaria because she was one of Santamaria's supervisors. Dawson said that Santamaria was a difficult person to work with because she was combative and did not take criticism of her work very well.

Dawson testified that Nikunen changed the procedure for the way Squadstat was to be prepared from the procedure implemented by previous chiefs. Santamaria often did not follow the new procedure. In the summer of 2008, Respondent and Dawson had meetings with Santamaria to discuss the deficiencies in her work. During these meetings, Santamaria was instructed on the proper way to complete the paperwork. In 2009, Santamaria's performance worsened, and another meeting was held to address these problems. Dawson said that other detectives in the unit adjusted to the way different chiefs wanted Squadstat prepared.

Dawson said that from 2008 to 2009, Santamaria changed her tour several times.

Dawson acknowledged that there was an incident where Santamaria wanted time off to

attend a funeral service. Dawson asked Santamaria to submit a '28.' Santamaria then filed a complaint with OEEO regarding this incident.

On cross-examination, Dawson admitted that she did not document the two times she instructed Santamaria on her performance. However, Dawson did document an instruction given to Santamaria on February 18, 2009. This followed the February 4, 2009, CD.

Francis Ortiz

Ortiz retired from the Department in 2010 as a detective. He was assigned to CDTU and was in charge of preparing Squadstat. Ortiz worked with Santamaria and Moceri, and was supervised by Respondent.

Ortiz described Santamaria as “[v]ery hostile.” He testified that on approximately October 29, 2008, after he returned from a Squadstat meeting, he realized that his desk had been emptied. He subsequently learned that Santamaria emptied his desk without his permission.

Ortiz testified that he reviewed 15 or 20 of Santamaria’s reports and concluded that none of them had been accurately completed. For instance, DX 7, a Squadstat report exemplar, was originally assigned to Santamaria. Because she did not conduct approximately 20 or 25 computer checks, she left the case about 90 percent incomplete, prompting Ortiz to redo it.

Ortiz stated testified that CDTU personnel had to stay late on Mondays and Wednesdays, and that from 2008 to 2009, Santamaria often changed her tours so that she could leave early on both days. In addition, Santamaria called out sick and missed several Squadstat meetings. Santamaria, even while she was working, missed several meetings because she was nowhere to be found.

Ortiz stated that different chiefs had preferences about how the reports were to be

prepared. Everyone in the unit had to adjust, but Santamaria did not do so. Ortiz said that everyone in the unit had an E-Justice code but because Santamaria allowed hers to expire, either Ortiz or Moceri had to conduct the E-Justice checks for her.

On cross-examination, Ortiz said that he was transferred to FED on approximately October 7, 2008, and that FED's office was on the first floor (the CDTU office was on the fifth floor). Although Ortiz was transferred prior to the desk incident, he was still working on the fifth floor because the first floor was under construction. Ortiz said he did not offer Moceri his desk after moving to the first floor.

Ortiz agreed that he had "a good social relationship" with Santamaria. He considered her a good person, though a bad detective. He also acknowledged that Santamaria was a single mother and sometimes had child care issues.

Susan McConnell (see RX C, recording; RX C1, transcript)

McConnell was a sergeant assigned to JCS. Respondent was the administrative lieutenant in FED. Their relationship was "straight up professional." She was "kind of structured" in terms of what she expected from personnel. For example, "if guys were changing their tours or taking off, you had to run it by them, you had to make sure that you had manpower coverage." McConnell observed that "you kind of have to . . . figure out everybody's structure and their work ethics. . . . It wasn't too difficult . . . to figure her out. . . . [S]he had her pet peeves and . . . you just knew them."

McConnell stated that she often had to fill in for Samuels when Samuels was supposed to go to Compstat but did not attend. Samuels would "[a]lmost always" adjust her Thursday night tour. This would lead to a lack of coverage. This was one of the problems O'Neill's '49' was

meant to address. Samuels also had a problem getting reports done on time. McConnell tried to maintain as professional a relationship as possible with Samuels, but Samuels "made things difficult at times."

Respondent

Respondent, a 25-year member of the Department, was assigned to the 28 Precinct. In April 2007, she was assigned to FED as the Squadstat coordinator. While working in FED, Respondent interacted with and supervised Samuels. Respondent testified that Samuels asked for her help getting MOI training. Respondent told Samuels she needed to submit a '49' requesting the training, but Samuels never did. Respondent denied saying "what are you going to do for me," in response to Samuels' request.

Respondent said that Samuels was an angry person and would become very confrontational when Respondent tried asking for information necessary for Compstat. In September 2008, Respondent called Samuels regarding Compstat information. During their conversation Samuels told Respondent that if Respondent "continue[d] to get on her back," Samuels would file a complaint. Samuels also told Respondent that she was recording the phone conversation. Respondent told Swinton and O'Neill about Samuels' "threat." Subsequently, O'Neill held a meeting with Respondent, McConnell and Samuels, in which he instructed Samuels and McConnell that Respondent had to be provided with any information she requested from them. O'Neill also asked Swinton to notify OEEO about what Samuels told Respondent.

Respondent testified that on September 11, 2008, she was unaware of any complaints filed against her. The first time she learned of the OEEO complaints was when she was served in late November or December 2008. Respondent had an official Department interview on

December 1, 2008.

On October 31, 2008, Respondent testified that while preparing a ‘49’ referring Samuels to PES, she noticed an issue in the roll call regarding Samuels’ work hours. She explained that Samuels’ roll call was a “flip flop” schedule, meaning that there would be one week of day tours and one week of night tours. But on Thursdays and Fridays, Samuels would adjust her tours from night tours to day tours. Respondent said that this was an issue because McConnell had to cover Samuels’ position. Respondent also said that Samuels avoided the Halloween Parade detail by calling out sick the day before.

Respondent said that she referred Samuels to PES because she thought there was something “mentally wrong” with Samuels. For instance, on October 16, 2008, Samuels called and said her grandfather had died and then the call got disconnected. Samuels called back, and this time asked if the ‘28’s she had submitted earlier had been approved. When Respondent asked what happened to her grandfather, Samuels responded, “[T]hat’s beside the point I need to know if you are going to give me the dates off.” Respondent denied her the days off because she did not believe Samuels was telling the truth.

On October 28 and 29, 2008, Samuels called for an administrative sick day but was denied by Respondent because Samuels could not provide an adequate reason for calling out sick. Samuels did however, go regular sick.

Respondent also said that Samuels became very defiant and began challenging her authority. One reason Respondent referred Samuels was that she felt Samuels “needed to see someone because there was something going on that was just not right.” Respondent did not, however, believe that Samuels was a danger to herself or others. She said that before referring Samuels to PES, she called and spoke to someone at the unit about the policy and procedures

regarding an evaluation.

Respondent denied having referred Samuels as retaliation against her for filing an EEO complaint against her.

Respondent also said that she supervised Santamaria. Santamaria's work was satisfactory under a prior commanding officer, but once Nikunen became the commanding officer, Santamaria's work fell below par. In June 2008, Respondent, along with Dawson, held a meeting with Santamaria in which they instructed her on ways of improving her work. But Santamaria's work worsened, and Respondent held another meeting in July 2008 and again instructed Santamaria on her duties.

In October 2008, Respondent said she was informed by Ortiz that his desk was emptied by Santamaria. Santamaria did not have Ortiz's permission to empty his desk. Respondent asked Santamaria to remove her personal property from the desk, but Santamaria refused. Respondent then warned Santamaria that she was being insubordinate and both of them then went to see Cassidy. Respondent told Cassidy about Santamaria's actions and also explained the discrepancies in her work. Santamaria eventually removed her property from Ortiz's desk.

Respondent testified that there was another incident where Santamaria failed to conduct the proper searches. This time, Nikunen realized the discrepancy and addressed the issue to Respondent.

Respondent issued Santamaria a CD in February 2009 because Santamaria did not conduct checks properly on an I-Card assigned to her. The I-Card could not be used in the upcoming Squadstat meeting and had to be reassigned to Ortiz.

At the time Respondent issued a CD to Santamaria, she was aware that Santamaria had filed an EEO complaint against her. However, Respondent denied having issued the CD as

retaliation against Santamaria.

Respondent testified that, based on the roll call from January to October of 2008, Santamaria either called out sick, changed her tour, or took lost time approximately 16 times.

On cross-examination, Respondent said that because Samuels had such a bad track record, and because she did not believe Samuels when Samuels told her that her grandfather had died, she denied Samuels her chart day. She said that Samuels was antisocial because she did not say hello to her, and, in Respondent's opinion, not saying hello was a violation of the courtesy procedure in the Patrol Guide. She agreed that it might not be unusual for a member of the service to want to leave early on Fridays.

Respondent testified that she neither yelled nor pointed a finger at Santamaria while addressing the desk incident. A few weeks after the desk incident, Respondent admitted, Cassidy instructed her that she was not Santamaria's direct supervisor.

On re-direct examination, Santamaria stated that she was not aware that, on September 11, 2008, Swinton called OEEO.

### FINDINGS AND ANALYSIS

#### The Allegations

Respondent is charged with conduct prejudicial to the good order, efficiency and discipline of the Department by taking certain actions with regard to two members of the service after those members made equal employment opportunity (EEO) complaints against Respondent.

Although the specifications do not list the term "retaliation," the Department's Office of Equal Employment Opportunity (OEEO) investigated both allegations under the rubric of retaliation, a term of art in employment discrimination law. It is charged in Specification No. 1

that Respondent “requested that the Medical Division perform a psychological evaluation of Sergeant Donna Samuels, without a legitimate basis to do so.” This is prefaced, however, with the allegation that the request was “after discovering that” Samuels “filed a complaint of employment discrimination against her.” Similarly, it is charged in Specification No. 2 that Respondent “improperly issued a Command Discipline to Detective Lina Santamaria for allegedly not conducting an assignment properly.” Again, however, the allegation is qualified with the statement that the CD was issued by Respondent “after discovering that” Santamaria “filed a complaint of employment discrimination against her.” An illegitimate request for a psychological evaluation or an improperly issued CD would itself be contrary to the good order, efficiency and discipline of the Department. The qualifiers that Respondent took these actions after discovering that the members filed employment discrimination complaints would be superfluous unless the specifications are read to contain an allegation that Respondent unlawfully retaliated against these members in response to the complaints.

#### Retaliation Generally

The New York City Human Rights Law prohibits retaliation in response to filing an EEO complaint. It defines retaliation as an act “reasonably likely to deter a person from engaging in protected activity.” See Administrative Code § 8-107 (7); Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 723 (2d Cir. 2010); Williams v. New York City Hous. Auth., 61 A.D.3d 62, 71 (1st Dept.), lv. denied, 13 N.Y.3d 702 (2009).

The standards used by the federal and state courts for resolving discrimination cases are useful here. To establish a prima facie case of retaliation, it must be shown that: (1) the employee engaged in a protected activity; (2) the employer was aware of the activity; (3) the

employer took adverse action against the employee; (4) and a causal connection exists between the protected activity and the adverse action.

(5) If a prima facie case is established, the burden shifts to the employer to show a legitimate, non-retaliatory reason for the adverse action. See LaFond v. General Physics Servs. Corp., 50 F.3d 165, 172-73 (2d Cir. 1995); Zakrzewska v. The New School, 14 N.Y.3d 469, 479 (2010). This means that the employer must contend that its reason for the adverse action was “neutral” as to any inference of discrimination. See Massie v. Metropolitan Museum of Art, 2010 U.S. Dist. Lexis 101243, \*36 (S.D.N.Y., Aug. 17, 2010).

(6) If the employer contends that its action was motivated by a reason other than the protected activity, the burden shifts back to the employee to prove that the articulated reason was a pretext for retaliation. See DeMarco v. Holy Cross High School, 4 F.3d 166, 170 (2d Cir. 1993). The question is not whether the proffered reason is unwise or unreasonable, but whether it was the actual reason for the adverse action. DeMarco, 4 F.3d at 170-71.

(7) Even if the employer took the actions in question for reasons other than those proffered, the employee still must prove that the actions were taken out of a subjective retaliatory motive. Cf. Fincher, 604 F.3d at 720; Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312-13 (2004).

In fact, this last question really is what a case like this comes down to: was there a retaliatory motive on Respondent’s part that caused her to refer Samuels for the psychiatric examination and to give Santamaria the CD. In the final review, the Department failed to prove this. Thus, the Court will recommend that Respondent be found Not Guilty.

(1) & (3) Protected Activity and Adverse Action

The Court takes it as established that Samuels and Santamaria engaged in protected activity when they made the EEO complaints against Respondent. It is also taken as a given that they each suffered an adverse employment action: being subjected to a psychological examination and being given a CD are both “reasonably likely to deter a person from engaging in protected activity.”

(2) Respondent’s Awareness of the Complaints

It was undisputed that Respondent knew about Santamaria’s complaint at the time the CD was issued. As to Samuels, the facts were more complicated. The actual EEO complaint in evidence was filed by Samuels on October 30, 2008. The ‘49’ requesting a psychological evaluation for Samuels was dated October 31, 2008. Respondent denied knowledge of this complaint and there was no direct evidence that she became aware of it within one day’s time.

Cf. Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (no indication that supervisor knew about employee’s right-to-sue letter when suggesting her transfer).

Samuels, however, testified that she often complained to Swinton, the ICO, about Respondent’s conduct. In September 2008, Swinton contacted OEEO on her behalf. There apparently was a conversation between Samuels and Respondent in which Samuels told her that she was going to file a complaint against her. Respondent, according to her own testimony, complained to the commanding officer, who instructed Swinton to call OEEO. Thereafter, OEEO called Samuels and said that Swinton had filed a complaint on her behalf. Samuels, however, told OEEO at that time that she did not want to pursue the complaint and would instead move on, as she was being promoted.

Thus, Respondent admitted knowledge of the referral that, counsel stated, was made to OEEQ on September 11, 2008. The Advocate represented that Specification No. 1's reference to "after discovering that Sergeant Donna Samuels, tax # 898466, filed a complaint of employment discrimination" could cover either or both dates. Respondent argued that whatever happened on September 11, 2008, it did not constitute the filing of an employment discrimination complaint, and, thus, there could not be a finding against Respondent on this specification.

The Court rejects Respondent's argument. In an administrative proceeding, it is required only that the charges be reasonably specific, in light of the relevant circumstances, to apprise the accused of the charges and to allow her to prepare an adequate defense. Matter of Block v. Ambach, 73 N.Y.2d 323, 333 (1989). That is what occurred here. At the time the specifications were served, Respondent knew that she was being accused of retaliating against Samuels after Samuels complained about discrimination. Respondent knew both that Swinton was instructed to call OEEQ in September 2008, and that Samuels had made the October 2008 EEO complaint. Notably, Respondent has not alleged surprise, inadequate notice, or prejudice. See Matter of Murphy v. County of Ulster, 218 A.D.2d 832, 833 (3d Dept. 1995).

The gravamen of the specification is that Respondent retaliated against Samuels for complaining to OEEQ about discrimination. This is not materially different from the conduct alleged in the charge. There is no impediment to reading the phrase "after discovering that Sergeant Donna Samuels, tax # 898466, filed a complaint of employment discrimination" to mean that when Swinton called OEEQ on September 11, 2008, whether for the ultimate benefit of Samuels, Respondent, both, or neither, Samuels effectively was complaining to OEEQ about alleged discrimination by Respondent.

Moreover, Respondent had sufficient notice of what she was being charged with:

retaliating against Samuels for complaining about discrimination. The fact that the specification charges that a complaint was “filed” by Samuels, when in fact an allegation of discrimination was referred, is not material. Cf. Matter of Electchester Hous. Project, Inc. v. Rosa, 225 A.D.2d 772, 773 (2d Dept. 1996) (human rights agency validly found that employer retaliated against employee for filing age discrimination complaint, even though complaint did not allege retaliation; under relevant statute, retaliation is a form of discrimination, so it was within the ambit of the discrimination complaint); Matter of Langhorne v. Jackson, 213 A.D.2d 909, 910 (3d Dept. 1995) (employee was charged with physically attacking supervisor by hitting and choking, and hearing officer found that there was an assault but nature and degree of it was not as important; this determination was within the ambit of the reasonably specific charge that employee physically attacked supervisor).

Accordingly, the Department proved that Respondent was aware of the EEO complaints of both Samuels and Santamaria.

#### (4) Causal Connection

The employee can show a causal connection by demonstrating that the protected activity: (a) was followed closely in time by discriminatory treatment; (b) that others who engaged in similar conduct as the employee were treated disparately, or; (c) direct evidence of retaliatory animus. DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir. 1987).

##### (a) Retaliatory Animus

There was no direct evidence of retaliatory animus. Cf. Gaffney v. Department of Information Tech. & Telecoms., 536 F. Supp. 2d 445, 470 (S.D.N.Y. 2008) (employer’s email

discussing possibility of lawsuit if certain employees were not rehired, and testimony at deposition that employee was not rehired because employer did not want him to “infect” the rest of the staff, “stirring up resentment,” and that employee was “a little bit of a rabble rouser” who “wouldn’t let go of the past,” constituted evidence of retaliatory animus); Hui Lin v. Great Rose Fashion, Inc., 2009 U.S. Dist. Lexis 46726, \*53 (E.D.N.Y., June 2, 2009) (meeting with employee day after service of lawsuit, and announcing suit to all employees so as to tell them of “potential negative implications arising therefrom,” were motivated by retaliatory animus and designed to intimidate).

(b) Temporal Proximity

When temporal proximity between the protected activity and the adverse action is used as circumstantial evidence of causality, the intervening time period must be “very close,” Breeden, 532 U.S. at 573 (citation omitted). Courts within the Second Circuit have developed, from review of many cases, that a two-month period is the “dividing line” beyond which a temporal relationship becomes too attenuated to prove causality. See Ruhling v. Tribune Co., 2007 U.S. Dist. Lexis 116, \*\*72- 73 (E.D.N.Y., Jan. 3, 2007); Cunningham v. Consolidated Edison Inc., 2006 U.S. Dist. Lexis 22482, \*55 (E.D.N.Y., Mar. 28, 2006).

In Samuels’ case, the passage between September 11, 2008, and October 31, 2008, was seven weeks. This was a short enough period to demonstrate causality for purposes of establishing a prima facie case, a de minimis burden to begin with, see Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir. 2005). In Santamaria’s case, however, the passage between November 2008 and February 2009 was approximately three months. Thus, the Department did not establish causality in this manner with regard to Santamaria’s case.

(c) Disparate Treatment

The Department can establish a causal relationship between Santamaria's EEO complaint and the CD by showing disparate treatment. The Department can demonstrate that other people who complained about discrimination received similar treatment. Based on the case law, however, the Department failed to do so. Cf. Nelson v. J.C. Penney Co., 75 F.3d 343, 346 (8th Cir. 1996) ("There is no evidence in the record that others who filed age discrimination charges were fired"); Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (plaintiff can show that other employees, dealing with the same supervisor and subject to the same standards as plaintiff, engaged in the same purported conduct without any differences that would distinguish their conduct, yet received more lenient treatment).

Therefore, the Department failed to establish a prima facie case that Respondent retaliated against Santamaria.

(6) Discrimination-Neutral Reasons and Pretext

Even if both complainants' cases are examined on the merits, however, Respondent still provided a discrimination-neutral reason in both instances. Respondent stated that she genuinely believed Samuels had exhibited behavior warranting a psychological examination. Respondent also testified that Santamaria had made errors on the Squadstat report to an extent that warranted a CD. The question for this Court, therefore, is whether those given reasons were pretexts for retaliation.

The testimony established that there was a long-standing personality conflict between Respondent and Samuels. The two did not like each other, and this had gone on for some time. Samuels felt Respondent had come on to her and this made her uncomfortable. Respondent felt

that Samuels was "anti-social," although this was meant not in the clinical sense, but rather that, for example, Samuels would not even say hello to Respondent. Additionally, in Respondent's view, Samuels constantly asked for time off and tour changes on Thursdays and Fridays. In October 2008, O'Neill, their commanding officer, held a meeting and put out a '49' explaining that certain things had to run by Respondent.

This all came to a head toward the end of October 2008. Respondent asked – once again, in Respondent's eyes – to be excused for Thursday, October 30, and Friday, October 31, 2008. In addition, Respondent contended that Samuels had already been notified to work a detail for the Halloween Parade in Greenwich Village. Samuels testified that she had just been promoted and would not have had to work the detail, but Respondent claimed that she called out sick to avoid it.

Two weeks earlier, Samuels testified, her grandmother's husband, whom she considered as her grandfather, had died. When Samuels asked for the days off, Respondent refused. Samuels asserted that Respondent did not believe her statement about the death; Respondent contended that Samuels was equivocal when asked about it, saying that it was "besides the point" whether her grandfather had died and that she needed the days off.

This incident seems to have been the last straw for both Samuels and Respondent. Samuels filed the discrimination complaint on October 30, 2008, and Respondent filed the psychological referral the next day. The reasons given by Respondent for the referral were that Samuels was unstable. Respondent described the recent incident, in which, according to Respondent, Samuels acted strangely, sidestepping whether her grandfather had died and wanting only to know whether she could have the days off. Respondent also stated that "[w]ithout exception," Samuels changed her tours when scheduled for a 1400x2200 tour or asked

for Thursdays and Fridays off. Respondent described Samuels as "aggressive" and "very anti-social," refusing to even say hello. Respondent stated that she was insubordinate as well when asked about her supervisory responsibilities, which she performed at a minimum level.

Respondent also repeated a rumor that Samuels had a gambling problem, which supposedly was connected to her desire to have Thursdays and Fridays off. Respondent ended the referral by stating that she was "extremely concerned with" Samuels' behavior.

At trial, Samuels had a different account about these issues, but the basic facts were the same. For example, the evidence showed that she often, but not always, made tour changes or sought excusals from January to October 2008. Of course, with the "flip flop" rotation, she was not always listed for nights on the roll call anyway. Samuels agreed that she was antisocial toward Respondent out of a desire not to interact with her. Samuels described the October 2008 incident differently. The person that had died, Samuels testified, was not technically her grandfather, but the husband of her grandmother. Although she thought of him like her grandfather, she agreed that she might have referred to him differently to various members of the command. Respondent questioned her on who had died, and Samuels responded, in sum and substance, that it was none of her business and she needed the days off. She was admittedly upset during this conversation.

A plaintiff trying to show that an employer's reason was pretext must show more than a disagreement with the employer's evaluation of deficient performance. It is not even enough to show that the employer was objectively incorrect. See Kalra v. HSBC Bank, 567 F. Supp. 2d 385, 397 (E.D.N.Y. 2008). The employer's reasoning does not have to be accurate or fair. See Miller v. National Assn. of Secs. Dealers, 703 F. Supp. 2d 230, 247 (E.D.N.Y. 2010).

Here, the Department and Respondent put on two different interpretations of the same

basic facts. The Department failed to prove by a preponderance of the evidence that Respondent's view, in which Samuels was so problematic an employee that a psychological evaluation was necessary, was pretext for retaliating against Samuels for the discrimination complaint, rather than a genuinely-held opinion. Cf. Cobb v. Frontier Communications of Rochester, Inc., 2010 U.S. Dist. Lexis 80465, \*\*12-13 (W.D.N.Y., Aug. 10, 2010) (while employee felt that his errors were minuscule and did not affect the organization, employer said the errors had a ripple effect, causing revenue loss and defective customer service); Baum v. County of Rockland, 337 F. Supp. 2d 454, 473 (S.D.N.Y. 2004) (employee's claim that employer manipulated Civil Service Law provision allowing for medical examinations in order to retaliate against her was unsupported by any evidence, even when drawing all reasonable inferences in her favor).

The analysis for Santamaria's case is similar. Santamaria insisted that her performance of Squadstat duties was up to par. Respondent disagreed. Both sides at trial presented evidence supporting their respective positions. As to the Squadstat report that led to the CD, Respondent presented witnesses that testified as to its defects, pointing them out specifically. Santamaria's subjective disagreement with Respondent's assessment did not prove pretext. The Department failed to prove by a preponderance of the evidence that Respondent's view, in which Santamaria continually made Squadstat errors warranting a CD to correct her performance, was pretext for retaliation and not a genuine command decision. Cf. Baum, 337 F. Supp. 2d at 472 (plaintiff's opinion about the quality of her work did not make employer's disagreement retaliatory, and the evidence demonstrated that employer had reasonable concerns); Valentine v. Standard & Poor's, 50 F. Supp. 2d 262, 284-85 (S.D.N.Y. 1999) (plaintiff must show more than subjective disagreement with employer's assessment of his performance; plaintiff said he gave good stock

tips, but employer gave him bad evaluations for sloppiness, tardiness, lack of creativity and bad writing, bad analysis, and poor interpersonal relationships).

#### (7) Subjective Retaliatory Animus

Even if Respondent took the actions in question for reasons other than those stated at trial, the Department still failed to prove that she did so out of a subjective retaliatory motive. See Matter of Pace Univ. v. New York City Commn. on Human Rights, 85 N.Y.2d 125, 128 (1995). Respondent did not get along with either Samuels or Santamaria, and the feeling was mutual. There was tension after Samuels felt that Respondent had come onto her, and after that Samuels avoided her completely. Santamaria stated that when she became PEA president, she tried to make it more accessible to all female members of the service because, according to her, it had become mostly an organization for lesbian women. Nor is there any question that Respondent was not an easy supervisor to work under. She demanded much of her subordinates, a fact confirmed by witnesses for both sides.

Mere personality conflicts do not constitute unlawful discrimination, and the anti-discrimination laws are not a general code of civility for the workplace. See Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006); Forrest, 3 N.Y.3d at 309. Here, there was no showing that Respondent took adverse action against either complainant as retaliation for their bringing discrimination complaints against her. As such, the Court recommends that Respondent be found Not Guilty. See Matter of Abram v. New York State Div. of Human Rights, 71 A.D.3d 1471, 1475-76 (4th Dept. 2010) (animus between employee and supervisor was longstanding and predated complaint; supervisor did not find employee satisfactory and did not trust her, and there was substantial evidence that this animus, and not any retaliatory intent, was reason for adverse

action); Grafe v. Iona Coll., 281 A.D.2d 347 (1st Dept. 2001) (while plaintiff's complaints about "glass ceiling" affecting female professors could constitute protected activity, there was no showing that the remarks caused her to be terminated).

Respectfully submitted,

  
David S. Weisel  
Assistant Deputy Commissioner – Trials

APPROVED

  
AUG 11 2012  
RAYMOND W. KELLY  
POLICE COMMISSIONER